

Docket: 2001-967(GST)G

BETWEEN:

BONDFIELD CONSTRUCTION
COMPANY (1983) LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

CERTIFICATE OF COSTS

I CERTIFY that I have taxed the party and party costs of the Appellant in this proceeding under the authority of subsection 153(1) of the *Tax Court of Canada Rules (General Procedure)* and I ALLOW THE SUM OF \$94,709.08.

Signed at Toronto, Ontario, this 17th day of September 2009.

“B.G. Tanasychuk”

Taxing Officer

Citation: 2009 TCC 466
Date: 20090917
Docket: 2001-967(GST)G

BETWEEN:

BONDFIELD CONSTRUCTION
COMPANY (1983) LIMITED

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR TAXATION

Barbara Tanasychuk, T.O., T.C.C.

[1] This taxation came on for hearing by way of a telephone conference call on Tuesday, June 16, 2009. It follows a Judgment of the Honourable Madam Justice Diane Campbell dated May 18, 2005, in which two sets of counsel costs were awarded to the Appellant. Mr. Timothy S.B. Danson represented the Appellant and Ms. Margaret J. Nott represented the Respondent.

[2] The Appellant's Bill of Costs included claims for counsel fees in the amount of \$240,523.70, disbursements of \$2,023.92 and expert witness fees in the amount of \$101,008.00. The amount claimed for disbursements was increased to \$2,559.08, representing an additional \$535.16 for disbursements incurred by the firm of Klein, Zigler, LLP.

[3] Ms. Nott stated that the Respondent was prepared to consent to the amount claimed for disbursements of \$2,559.08. Ms. Nott further stated that the Respondent was prepared to consent to the amount of \$92,000.00 for counsel fees, which represented two sets of counsel fees for all applicable Tariff items. It is the Respondent's position that the Appellant is not entitled to recover any amount for expert witness fees.

APPELLANT'S POSITION

[4] Mr. Danson stated that the Appellant is entitled to recover more than \$92,000.00 for counsel fees, as well as the amount of \$101,008.00 for expert witness fees paid for services provided by the Appellant's expert witness, Susan Farina.

[5] Mr. Danson reviewed, at great length, the details of the evidence presented at the ten day hearing, a brief summary of which follows.

[6] The Appellant is a large institutional builder, constructing buildings such as schools, penitentiaries and hospitals. During the relevant time period, the Appellant was conducting one hundred million dollars in business per year. In June of 1998, the Appellant was reassessed for close to two million dollars, which amount was paid. The payment put a huge financial strain on the company, threatening its very existence. To compound the challenges faced by the Appellant, its principal, Ralph Aquino, was caring for his seriously ill wife and the company's comptroller, Bishwajeet Kar, defrauded the Appellant of close to one million dollars. Mr. Kar was eventually convicted of the charges against him, but no restitution was ever paid to the Appellant. The assessment was appealed to the Court, which resulted in a 10 day hearing. The Appellant met with success in challenging the reassessment and was awarded two sets of costs.

[7] Mr. Danson stated that the amounts claimed for counsel fees represented the time spent by several lawyers dealing with a very complex, document intensive matter, with close to two million dollars on the line. Given the amount of money that was at issue, the Appellant had no choice but to retain experienced counsel and aggressively challenge the reassessment.

[8] Mr. Danson acknowledged that the Court's award of costs was on a party and party basis. However, based on his experience in the Superior Court of Justice, party and party costs represent approximately sixty percent of a party's full costs. As such, he is seeking an award of costs in the range of \$135,000.00.

[9] Mr. Danson's position is that the authority of a Taxing Officer is similar to that of a Judge and that the provisions of Rule 147(3) of the *Tax Court of Canada Rules (General Procedure)* (Rules) must be read in tandem with Rule 154. He suggests that there is no need for the trial judge to give directions to the Taxing Officer pursuant to Rule 147(6) because the Taxing Officer is required to consider the items set out in Rule 154 in determining what costs to allow.

[10] Mr. Danson stated that Susan Farina is a chartered accountant and a partner with the firm of Goldfarb, Shulman, Patel & Co. LLP. This firm was hired as the external accountants for the Appellant, after the reassessment was issued that was the subject of this appeal. Mr. Danson's position is that Ms. Farina was retained as an expert witness and testified as such at the hearing. Given that Ms. Farina is an expert, the Appellant is entitled to recover costs associated with the services provided by her in that capacity. Without Ms. Farina's expertise, it would have been impossible for the Appellant to defeat the reassessment under appeal. Ms. Farina also provided assistance to Appellant's counsel, in terms of explaining the intricacies associated with the collection and remittance of GST in the construction industry.

[11] In addition, Ms. Farina was produced to answer questions on examination for discovery. Mr. Danson stated Ms. Farina possessed a unique level of expertise and was a significant player in the proceedings. All of Ms. Farina's evidence was accepted by the Court, as referred to in the Reasons for Judgment at paragraph 113:

[...] Ms. Farina presented herself as a highly professional, competent and reliable witness who was knowledgeable and skilled in accounting matters. I was very impressed with her testimony. I have no reason not to accept all of her evidence.

[12] Mr. Danson stated that the breakdown of the time spent by Ms. Farina and her junior was provided to substantiate the amount claimed. Ms. Farina's hourly rate was \$325.00 and the hourly rate for a junior ranged from \$90.00 to \$150.00. Of the total amount claimed of \$101,008.00, \$88,237.50 was for Ms. Farina's time and the balance for the time of her junior. He stated that the amounts claimed were very reasonable, given the substantial amount of money that was at issue.

[13] Mr. Danson's position is that the section of Schedule II, Tariff A dealing with fees paid to expert witnesses does not specify that fees are only payable for an expert who submits an expert report and is qualified as an expert witness.

[14] Mr. Danson referred to several cases in which fees for experts were allowed, to support his position that the Appellant was entitled to recover the amount paid for Ms. Farina's services.

RESPONDENT'S POSITION

[15] Ms. Nott stated that on a taxation of costs, the only issue to be determined by the Taxing Officer is the appropriate amount of costs.

[16] Ms. Nott stated that a party has the right to apply to the Court to request that directions be given to the Taxing Officer, pursuant to Rule 147(7) of the Rules. Mr. Danson did not make such an application and the time for doing so has long passed. Ms. Nott referred to the decision in *Atcon Construction Inc. v. Her Majesty the Queen*, 2003 DTC 373, where the Appellant applied to the Court for an extension of time to request that directions be given to the Taxing Officer. The Court denied the application and made reference to the decision in *Mark G. Smerchanski v. Minister of National Revenue*, [1979] 1 F.C. 801, wherein the Court stated at paragraph 11:

[...] it is contemplated that any such application for a direction increasing costs should be made while the matter is sufficiently fresh in the mind of the Court that the Court is in a position to appreciate whether there were present in the particular case circumstances justifying a departure from the normal tariff amounts; [...]

Ms. Nott stated that the Judgment in this appeal was released in excess of four years ago, so that the matter was far from fresh in the mind of the Court.

[17] Ms. Nott referred to the decision of *Carolyn Miller v. Her Majesty the Queen*, 2003 DTC 6, where the applicant sought to have the award of costs increased to a lump sum or, in the alternative, to obtain an award of solicitor and client costs. The Court denied the request and referred to the decision of former Justice Donald G.H. Bowman of this Court in *Continental Bank of Canada v. Canada*, [1994] T.C.J. No. 863, at paragraphs 9 and 10:

9 It is obvious that the amounts provided in the tariff were never intended to compensate a litigant fully for the legal expenses incurred in prosecuting an appeal. The fact that the amounts set out in the tariff appear to be inordinately low in relation to a party's actual costs is not a reason for increasing the costs awarded beyond those provided in the tariff. I do not think it is appropriate that every time a large and complex tax case comes before this court we should exercise our discretion to increase the costs awarded to an amount that is more commensurate with what the taxpayers' lawyers are likely to charge. It must have been obvious to the members of the Rules Committee who prepared the tariff that the party and party costs recoverable are small in relation to a litigant's actual costs. Many cases that come before this court are large and complex. Tax litigation is a complex and specialized area of the law and the drafters of our Rules must be taken to have known that.

10 In the normal course the tariff is to be respected unless exceptional circumstances dictate a departure from it. Such circumstances could be misconduct by one of the parties, undue delay, inappropriate prolongation of the

proceedings, unnecessary procedural wrangling, to mention only a few. None of these elements exists here.

[18] Ms. Nott stated that there is no basis for an award of solicitor and client costs and what Mr. Danson is seeking is full indemnity.

[19] Ms. Nott referred to the case of *Polsinelli v. Canada*, 2004 TCC 720, [2004] T.C.J. No. 544, wherein an application for an Order pursuant to subsection 147(7) of the Rules for an award of costs in excess of Schedule II, Tariff B of the Rules was dismissed. In dismissing the application, the Court referred to the decision in *Continental Bank of Canada* (above at paragraph 18), wherein it was recognized that costs awards were not designed to cover the full costs of litigation.

[20] With respect to the claim for recovery of the expert witness fees, Ms. Nott referred to the decision in *Countess Rozina Gulamhusein Ismail Hassanali, Executrix and Trustee of the Estate of Count Sajan Hassanali v. Her Majesty the Queen*, 98 DTC 1406, [1998] T.C.J. No. 72, wherein the Taxing Officer disallowed a claim for experts who were called as witnesses, but were not recognized as expert witnesses.

[21] The last decision referred to by Ms. Nott was the unreported decision of the Registrar in *Canwest Capital Inc. v. Her Majesty the Queen*, (Court File No. 94-3053(IT)G), wherein the claim for expert witness fees was disallowed as the witness had not been qualified as an expert witness in accordance with the Rules.

[22] Ms. Nott stated that in view of the fact that Susan Farina did not testify as an expert, the Appellant is only entitled to recover \$150.00, which is the fee payable to a witness for testifying on two days.

DECISION

[23] There is no dispute as to the success of the Appellant in challenging the assessment against it, the details of which are set out in the Court's very detailed Reasons for Judgment. That success resulted in the Court's award of two sets of costs to the Appellant. The two issues to be determined are: (1) the allowable amount for counsel fees and; (2) the fees allowable for the witness Susan Farina.

[24] Pursuant to Rule 147(6), the Court may give directions to the Taxing Officer. That Rule is as follows:

(6) The Court may give directions to the taxing officer and, without limiting the generality of the foregoing, the Court in any particular proceeding may give directions,

(a) respecting increases over the amounts specified for the items in Schedule II, Tariff B,

(b) respecting services rendered or disbursements incurred that are not included in Schedule II, Tariff B, and

(c) to permit the taxing officer to consider factors other than those specified in section 154 when the costs are taxed.

[25] Pursuant to Rule 147(7), a party may apply to the Court for directions to be given to the Taxing Officer. That rule reads as follows:

(7) Any party may,

(a) within thirty days after the party has knowledge of the judgment, or

(b) after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,

whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer respecting any matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

[26] In the absence of a direction from the Court to the Taxing Officer pursuant to one of the above Rules, the costs of the Appellant must be taxed and allowed in accordance with Schedule II, Tariff B. In determining the amounts to allow under Schedule II, Tariff B, Rule 154 requires the Taxing Officer to consider:

[...]

(a) the amounts in issue,

(b) the importance of the issues,

(c) the complexity of the issues,

(d) the volume of work, and

(e) any other matter that the Court has directed the taxing officer to consider.

[27] The amounts at issue in this appeal were significant, the issues were of great importance to the Appellant, the issue of GST in the construction industry is complex and the work involved in conducting the litigation was

significant. However, I am bound by the Tariff and none of these factors authorize me to allow counsel fees over and above those set out in the Tariff.

[28] Counsel for the Appellant cited jurisprudence relating to instances where the Court awarded costs beyond what was permitted by the Tariff. The Court's authority in awarding costs is vastly different from the authority of a Taxing Officer and the jurisprudence cited is not relevant here.

[29] I will therefore allow the amount of \$92,000.00 for counsel fees, as agreed to by counsel for the Respondent.

EXPERT WITNESS FEES

[30] Rule 145(2) contains specific provisions for evidence to be given by experts, as follows:

- (2) Unless otherwise directed by the Court, no evidence in chief of an expert witness shall be received at the hearing in respect of an issue unless,
 - (a) the issue has been defined by the pleadings or by written agreement of the parties stating the issues,
 - (b) a full statement of the proposed evidence in chief of the witness has been set out in an affidavit, the original of which has been filed and a copy of which has been served on all other parties, not less than thirty days before the commencement of the hearing; and
 - (c) the witness is available at the hearing for cross-examination.

[31] Mr. Danson referred to several decisions to support his position that the Appellant was entitled to recover the fees paid to Susan Farina as expert fees: *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, 2000 NSCA 44, [2000] N.S.J. No. 96, *RMM Canadian Enterprises Inc. and Equilease Corporation v. Her Majesty the Queen*, 97 DTC 420, [1997] T.C.J. No. 445, *Canada Trustco Mortgage Co. v. Canada*, 2007 TCC 500, [2007] T.C.J. No. 461, *J. Allen Carr v. Her Majesty the Queen*, 96 DTC 2066, [1995] T.C.J. No. 265 (confirmed by the Federal Court of Appeal, see [1996] F.C. J. No. 527) and *Mon-Oil Ltd. v. Canada*, [1993] F.C.J. No. 1447.

[32] In the decision of the Nova Scotia Court of Appeal in *D.W. Matheson & Sons Contracting Ltd.* (above at paragraph 33), the matter of a disbursement for an engineer witness was returned to the trial judge to exercise his discretion. The discretionary power of the Court in allocating

costs awarded to a party is very broad. A Taxing Officer does not have the same discretionary power.

[33] In the decision of *RMM Canadian Enterprises Inc. and Equilease Corporation* (above at paragraph 33), Justice Bowman held that the Respondent was entitled to recover costs for two expert witnesses. One of the experts testified, while the other did not. A report of the expert who did not testify had been filed and he was ready to testify, but was not called upon by counsel. This case concerned the Court's exercise of discretionary power.

[34] In *J. Allen Carr* (above at paragraph 33), the Federal Court of Appeal upheld a decision of former Justice Kempo of the Tax Court of Canada, wherein a disbursement for an expert report prepared prior to the commencement of litigation was allowed. The author of the report did not testify at trial, but the report was referred to in the Reasons for Decision of the Court and was utilized by the other experts in the litigation.

[35] The case of *Mon-Oil Ltd.* (above at paragraph 33) is a decision of the Taxing Officer in the Federal Court of Appeal. I am not bound by decisions of Taxing Officers in other Courts dealing with a different set of Rules and Tariffs.

[36] In the case of *Canwest Capital Inc.* (above at paragraph 22), a claim for payment to an expert witness was disallowed. The Taxing Officer found that expert witnesses, as defined in section 145 of the Rules and in Tariff A, must be accepted by the Court as experts in order to be reimbursed as such.

[37] While the Court fully accepted all of the evidence of Ms. Farina and made numerous references to her testimony in the Reasons for Judgment, a review of the Court file disclosed that the Appellant did not comply with provisions of Rule 145(2)(b). The failure to do so is significant.

[38] Susan Farina was not an expert witness as defined by Rule 145. As a result, the Appellant is only entitled to recover \$75.00 per day for each day that Ms. Farina testified in Court, for a total of \$150.00. The claim for payments paid to Goldfarb, Shulman, Patel & Co. LLP, in the amount of \$101,008.00 is taxed off and the amount of \$150.00 is allowed as a disbursement for the two days that Ms. Farina testified.

[39] The bill of costs is taxed and \$94,709.08 is allowed. A Certificate in that amount will be issued.

Signed at Toronto, Ontario, this 17th day of September 2009.

“B.G. Tanasychuk”

Taxing Officer